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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In re Subpoena of Roger Gimbel by FDIC as Receiver for First New York Bank for Business.

ROGER GIMBEL,

Petitioner,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

I. Whether the Second Circuit impermissibly eliminated the constitutional distinction between the greater Fourth Amendment protections afforded individuals and the lesser protection given to corporations under *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), in affirming enforcement of a broad-ranging administrative agency subpoena requiring production of an individual's personal confidential financial records absent a showing of any individualized suspicion of wrongdoing?

II. Whether the Fourth Amendment reasonableness test requires, as a prerequisite to the judicial enforcement of a broad-ranging administrative agency subpoena seeking an individual's personal financial records, that the administrative agency at the least demonstrate articulable suspicion of individualized wrongdoing?

STATEMENT PURSUANT TO RULE 29.6

The only parties to this action are those listed in the caption. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISION 2

STATEMENT OF THE CASE 2

I. Background 3

II. Proceedings Below 5

REASONS FOR GRANTING THE PETITION 6

I. THE SECOND CIRCUIT DECISION THAT *MORTON SALT* IS OUTDATED AND INAPPLICABLE IS ERRONEOUS AND DIRECTLY CONFLICTS WITH UNAMBIGUOUS SUPREME COURT PRECEDENT 6

PAGE

II. THE PETITION SHOULD BE GRANTED TO CLARIFY THE CONFUSION EXTANT IN THE LOWER COURTS REGARDING THE STANDARD OF CONSTITUTIONAL SCRUTINY TO BE APPLIED TO AN ADMINISTRATIVE AGENCY SUBPOENA AIMED AT PERSONAL FINANCIAL RECORDS OF A FORMER BANK DIRECTOR 13

CONCLUSION 18

TABLE OF AUTHORITIES

Cases	PAGE
Boyd v. United States, 116 U.S. 616 (1886)	8
Camara v. Municipal Court, 387 U.S. 523 (1967)	8, 9
Delaware v. Prouse, 440 U.S. 873 (1979)	10
Donovan v. Lone Steer, Inc., 464 U.S. 408 (1984)	8
FDIC v. Wentz, 55 F.3d 905 (3d Cir. 1995)	14, 17
Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924)	8
Federal Trade Commission v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977)	9
Florida v. Jimeno, 500 U.S. 248 (1991)	9
In re Gimbel, 77 F.3d 593 (2d Cir. 1996)	1, 6, 8, 11
In re McVane, 44 F.3d 1127 (2d Cir. 1995)	17
In re Sealed Case (Administrative Subpoena), 42 F.3d 1412 (D.C.Cir. 1994)	8, 18
Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894)	12
Linde Thomson Langworthy Kohn & Van Dyke v. RTC, 5 F.3d 1508 (D.C.Cir. 1993)	6
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946)	7-9
Parks v. FDIC, 65 F.3d 207 (1st Cir. 1995), *opinion withdrawn, reh'g en banc granted* (Nov. 20, 1995), *on reh'g*, (Mar. 15, 1996)	13-16

PAGE

RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994) 18

Ryan v. United States, 379 U.S. 61 (1964) 10, 11

Terry v. Ohio, 392 U.S. 1 (1968) 9

United States v. Calandra, 414 U.S. 338 (1974) 9

United States v. Jaramillo, 25 F.3d 1146 (2d Cir. 1994) 10

United States v. Miller, 425 U.S. 435 (1976) 12

United States v. Morton Salt Co., 338 U.S. 632 (1950) ..... i, 6-9, 18

United States v. Powell, 379 U.S. 48 (1964) 10, 11

United States v. Price, 599 F.2d 494 (2d Cir. 1979) ... 10

United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969) 11, 12

Statutes

F.R.Evid. 201, 28 U.S.C.A. 6

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub.L. No. 101-73, 103 Stat. 183, codified as amended at 12 U.S.C. §§ 1441a, 1811, et seq. 2, 3

U.S. Const. Amend. IV 2, 8

28 U.S.C. § 1254(1) 2

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PETITION FOR WRIT OF CERTIORARI

Petitioner, ROGER GIMBEL ("Gimbel"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit ("Second Circuit") in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 77 F.3d 593 (2d Cir. 1996) and is reprinted in the Appendix, *infra*, at 1a-23a. The unreported order of the district court in this case is reprinted in the Appendix, *infra*, at 24a.

STATEMENT OF JURISDICTION

The Second Circuit entered its judgment on February 21, 1996, affirming the order of the United States District Court for the Southern District of New York. Neither party requested rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Constitutional provision involved in this petition is the Fourth Amendment to the United States Constitution, which provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

U.S. Const., IV Am.

STATEMENT OF THE CASE

This case involves the Second Circuit's refusal to follow the Supreme Court's articulated standard of Fourth Amendment protection to be afforded an individual who is the target of an administrative subpoena, which subpoena sought personal, confidential financial records of a former outside director of a failed bank against whom there was alleged no articulable suspicion of individualized wrongdoing.

The Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub.L. No. 101-73, 103 Stat. 183 (codified as amended at 12 U.S.C. §§ 1441a, 1811, *et seq.*) ("FIRREA") is alleged to provide the basis for federal jurisdiction in the court of first instance. FIRREA provides, in part, that:

> The Corporation may, as conservator, receiver, or exclusive manager and for the purposes of carrying out any power, authority or duty with respect to an insured

> depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 1818(n) of this title. . . .

12 U.S.C. § 1821(d)(2)(I)(i). Section 1818(n) provides that the FDIC shall have the power to, among other things, issue, revoke, and quash subpoenas duces tecum. 12 U.S.C. § 1818(n).

I. Background

Petitioner Roger Gimbel ("Gimbel") is the Chairman, Chief Executive Officer and President of RGA Accessories, Inc., an importer and distributor of personal accessories, small leather goods and related items. In 1986, Gimbel invested in the First Women's Bank, a relatively small, struggling commercial bank located in New York.[1] His investment in common shares and subordinated debentures totalled almost $1,000,000. Gimbel was elected a director of FNYBB in or about 1986. The Board included a large number of outside (non-management) directors whose names, business affiliations and reputations were well-known and highly regarded in the business community.

On November 13, 1992, FNYBB was declared insolvent and was taken over by the FDIC. Gimbel's investment was rendered practically worthless.

On June 13, 1995, Gimbel was served with a subpoena by the FDIC, which called for Gimbel's disclosure of virtually every detail of his confidential private financial affairs. Production was demanded of ten (10) categories of personal financial information with respect to Gimbel and members of

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[1] The Bank's name was subsequently changed to First New York Bank for Business (hereafter "FNYBB").

his immediate family.[2] The subpoena purports to be issued pursuant to an order of investigation dated June 5, 1995 which specifies four purposes of the investigation, *i.e.*, to determine whether (1) former officers, directors and others who provided services to FNYBB may be liable as a result of any actions or failures to act; (2) pursuit of litigation would be cost effective considering the extent of a potential defendant's ability to pay a judgment; (3) the FDIC should seek to avoid a transfer of any interests or incurrence of any obligation; and (4) the FDIC should seek an attachment of assets.[3]

Gimbel challenged the subpoena by motion to quash on various grounds, including that the subpoena violated Gimbel's Fourth Amendment right against unreasonable searches.

In opposition to the motion to quash and in support of its cross-motion for enforcement, the FDIC filed a "form" dec-

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[2] The subpoena demands production of:

(1) financial statements;

(2) credit applications;

(3) records of accounts in depository institutions;

(4) records of the source and amount of any income;

(5) federal, state and local income tax returns;

(6) records relating to investments in stocks, bonds, securities or other investments;

(7) documents relating to any financial, real or personal property transactions having a value of more than $5,000;

(8) records relating to transfers of assets exceeding $5,000 outside the United States;

(9) records relating to interests in real, personal or other property exceeding $5,000;

(10) policies of liability insurance.

The subpoena is reproduced in the Joint Appendix filed in the Second Circuit at A-17 to A-22 (hereafter referred to as "JA" followed by the appropriate page number).

[3] The Order of Investigation is reproduced in JA at A-23.

laration by its Investigator Leahy. The totality of Investigator Leahy's showing of "articulable suspicion" of wrongdoing on the part of Gimbel included no individualized allegations. Under oath, Gimbel denied the generalized, conclusory and unsupported "form" allegations in the Leahy declaration. Nothing was filed by the FDIC rebutting any of Gimbel's sworn statements.[4] Nonetheless, in a cryptic one paragraph order, the dist ct court found that "[t]he FDIC has made an adequate showing that it has a reasonable basis for its determination that Mr. Gimbel may be liable to the bank of which he was a director" (*infra*, at 24a). On appeal, the Second Circuit affirmed.

II. Proceedings Below

Gimbel moved the district court for an order quashing the FDIC subpoena because (1) the FDIC failed to demonstrate "reasonable cause" or even an "articulable suspicion" of any wrongdoing on Gimbel's part to justify its intrusion into his personal financial affairs; (2) the subpoena violated Gimbel's constitutional rights; and (3) the subpoena exceeded the authority of the FDIC and/or requested information not relevant to the purposes of the investigation. The FDIC cross-moved for an order enforcing the subpoena. The district court denied the motion to quash and granted the cross-motion for enforcement (*infra*, at 24a).

Upon appeal to the Second Circuit, Gimbel argued, among other things, that the agency subpoena was constitutionally defective because it violated his Fourth Amendment right against unreasonable searches and that the subpoena was insufficient as a matter of law with respect to each purpose of the investigation. In determining that the subpoena was enforceable, the Second Circuit held that the Supreme Court's distinction between corporations and individuals was outdated and not applicable where the FDIC seeks the personal finan-

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[4] The Leahy Declaration is reproduced in JA at A-29 to A-38, and the Gimbel affidavit at A-11 to A-16.

cial records of a former director of a failed bank. *In re Gimbel*, 77 F.3d at 598, 600 (*infra*, at 10a-13a, 15a-16a).

The Second Circuit has established a Fourth Amendment standard for individuals confronted with agency subpoenas seeking personal, confidential documents that contradicts established Supreme Court precedent. Moreover, other lower courts have acted similarly, producing a line of cases that reduce Fourth Amendment protections afforded former directors of failed banks, despite the clear pronouncement of *Morton Salt*. There is, thus, a compelling need for this Court to review this issue to avoid the *sub silentio* overruling of *Morton Salt*. Accordingly, Gimbel seeks review of this irreconcilable and direct conflict between established Supreme Court precedent as set forth in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) and the Second Circuit decision below.[5]

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT DECISION THAT *MORTON SALT* IS OUTDATED AND INAPPLICABLE IS ERRONEOUS AND DIRECTLY CONFLICTS WITH UNAMBIGUOUS SUPREME COURT PRECEDENT

The guiding principle of *Morton Salt* is that corporations do not enjoy the same privacy rights as individuals since

> [w]hile they [corporations] may and should have protection from unlawful demands made in the name of pub-

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[5] The Court may take judicial notice under F.R.Evid. 201, 28 U.S.C.A., of the FDIC's subsequent commencement of litigation against Gimbel in *FDIC v. Bober, et al.*, 95 Civ. 9529 (JSM) (S.D.N.Y.). The instant proceeding is not rendered moot by virtue of such subsequently commenced litigation nor because some of the requested records have been produced. *See Linde Thomson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508, 1516, 1518 (D.C.Cir. 1993).

> lic investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.

338 U.S. at 652; *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 204-05 (1946) ("corporations are not entitled to all of the constitutional protections which private individuals have").

The Second Circuit, however, chose to disregard this crucial constitutional distinction. The Court below stated:

> . . . the language in *Morton Salt* and *Oklahoma Press*, indicating that corporations enjoy less protection than do individuals under the Fourth Amendment is, at least in the context of administrative subpoenas, representative of an era that was still coming to terms with the modern regulatory state. The decisions of the Supreme Court in *Morton Salt* and *Oklahoma Press* reveal a Court struggling to reconcile the Fourth Amendment and the emerging, post-war regulatory state, and finding some additional support for its decision in the fact that the party invoking the Fourth Amendment was a corporation. The *Powell-Ryan* line of cases removed many of the chains that bound agency investigations.
>
> The Court's decisions in *Powell* and *Ryan* evince a more modern view of the regulatory state, and one that recognizes that Congress may authorize administrative agencies, such as the IRS and Federal Trade Commission and, as in this case, the FDIC, to investigate suspected wrongdoing in their respective fields of expertise.

In re Gimbel, 77 F.3d at 598 (citations omitted) (*infra*, at 12a). The Second Circuit reasoning that the advent of the "modern regulatory state" permits the disregard of Supreme Court precedent as outmoded is incorrect. In any event, the constitutional issue posed by this petition is highly significant and warrants review by this Court.

The Fourth Amendment to the United States Constitution protects the "*right of the people to be secure in their* persons, houses, *papers*, and effects, against unreasonable searches and seizures. . . ." U.S. Const. Amend. IV (emphasis added). It is settled that an administrative subpoena constitutes a search within the meaning of the Fourth Amendment. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984); *United States v. Morton Salt Co.*, 338 U.S. 632, 651 (1950) ("the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men,' is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process. . .') (citations omitted); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Boyd v. United States*, 116 U.S. 616 (1886); *see Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) ("basic purpose" of Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials").

This Court has historically held that an agency's subpoena powers are not limitless. *E.g.*, *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924) (Holmes, J.) ("Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to . . . direct fishing expeditions into private papers on the possibility that they may disclose evidence of a crime") (citation omitted); *accord*, *In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1418-19 (D.C.Cir. 1994) (quoting *American Tobacco* approvingly); *see Federal Trade Com-*

mission v. Texaco, Inc., 555 F.2d 862, 903 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977).

Under the more lenient standard applicable to corporations (as distinguished from individuals), a court called upon to enforce an agency subpoena must satisfy itself that "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States v. Morton Salt Co.*, 338 U.S. at 652. The "gist of the protection [provided by the Fourth Amendment against administrative subpoenas] is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. at 208; *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("touchstone of the Fourth Amendment is reasonableness"); *United States v. Calandra*, 414 U.S. 338, 354 (1974) ("purpose of the Fourth Amendment is to prevent unreasonable government intrusions into the privacy of one's person, house, papers, or effects"); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) ("the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security'); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

Contrary to the Second Circuit's decision below, *Morton Salt* requires a court to take cognizance of the fundamental constitutional difference between the Fourth Amendment protection accorded an individual threatened with an intrusive subpoena for confidential personal financial records as compared to a corporation which enjoys no such protection. Under *Morton Salt*, individuals merit a higher degree of Fourth Amendment protection when faced with an intrusive agency subpoena. The Supreme Court has not extended the more lenient *Morton Salt* "reasonably relevant" standard for administrative subpoenas of corporate records to an individual's private, confidential records; rather, the Court has always placed the standard in the context of the corporate status of the subpoena target. As a result, while an administrative agency like

the FDIC must, at a minimum, meet the *Morton Salt* test in all cases involving administrative subpoenas, it must also meet the additional requirement of demonstrating that its need for the subpoenaed documents outweighs the individual's substantial privacy interests when the subpoena seeks personal documents. Implicit in such weighing of "need" is the existence of some articulable suspicion of individualized wrongdoing.[6]

The Internal Revenue Service ("IRS") subpoena cases of *United States v. Powell*, 379 U.S. 48 (1964) and *Ryan v. United States*, 379 U.S. 61 (1964), on which the Second Circuit relied, are inapposite and cannot be read as generally overruling *Morton Salt*. First, the heightened governmental interest in enforcing taxation laws combined with a taxpayer's lower expectation of privacy militate toward enforcing IRS subpoenas; these two factors mandate a different outcome in a Fourth Amendment balancing test than in cases involving subpoenas from other administrative agencies. Second, both *Powell* and *Ryan* held only that an IRS subpoena need not be supported by probable cause; they did not consider what lesser showing is necessary to satisfy the constitutional requirements applicable to individuals—the question posed at bar.

Unlike the FDIC, the express function of the IRS is to determine the financial condition of taxpayers in the process of assessment and collection of taxes. To accomplish this end,

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[6] The concept of "individualized suspicion" comports with accepted constitutional norms. *See United States v. Price*, 599 F.2d 494, 499 (2d Cir. 1979) (requiring "some quantum of individualized suspicion" for constitutional search in stop context); *United States v. Jaramillo*, 25 F.3d 1146, 1151 (2d Cir. 1994) ("any invasion of a person's Fourth Amendment interests must be justified at least by "specific and articulable facts" directed to the person whose interests are to be invaded."). Failure to require individualized suspicion of wrongdoing amounts to no protection at all for an individual, which result this Court has not endorsed. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 661 (1979). There can be no compelling rationale for the wholesale departure from traditional Fourth Amendment jurisprudence at bar.

the tax code is predicated on self-assessment and voluntary compliance. *United States v. Roundtree*, 420 F.2d 845, 850 (5th Cir. 1969). As noted in *United States v. Roundtree*, the "significance of the public interest, governmental revenue, is beyond dispute." *Id.*

A second factor distinguishing IRS cases from cases involving other agency subpoenas is the individual taxpayer's lower expectation of privacy, derived from a statutory scheme which relies on self-assessment and voluntary compliance. By completing a tax return and signing it, the taxpayer swears subject to the penalties of perjury that his or her tax return accurately summarizes information contained in his or her financial records. Having thus sworn to the IRS regarding the contents of such records lowers the taxpayer's expectation of privacy. Thus, it is difficult to envision a situation in which a reasonably limited IRS subpoena would not be enforced, given the high government interest at stake and the taxpayer's comparatively low expectation of privacy.

Accordingly, IRS subpoena cases involving taxpayers are distinguishable from cases involving other types of administrative subpoenas directed at an individual's financial records which do not involve comparable governmental interest and the individual's lower expectation of privacy.

The Second Circuit mistakenly read *United States v. Powell*, 379 U.S. 48 (1964) and *Ryan v. United States*, 379 U.S. 61 (1964), two IRS subpoena cases, as evincing "a more modern view of the regulatory state" and, consequently, ruled that mere relevance is all that is required for an administrative subpoena, even if directed to an individual's confidential financial records. 77 F.3d at 598 (*infra*, at 12a). Significantly, the Second Circuit did not attempt to analyze the differences in a constitutional sense between an individual who undertakes to serve as an outside director of a financial institution which ultimately becomes insolvent and a taxpayer who files a tax return and is thereafter subjected to an audit. In this con-

text, *Powell* is immediately distinguishable from the situation at bar—it involved a subpoena which called for the production of *corporate* records. Moreover, "*Powell* did not explicitly consider constitutional limitations on the Commissioner's power." *United States v. Roundtree*, 420 F.2d at 849. *Ryan* is likewise distinguishable. The parties in *Ryan* did not address the qualitative difference in constitutional protection accorded an individual and a corporation in a Fourth Amendment analysis. Accordingly, the Supreme Court did not rule on that issue in *Ryan*. As a result, these cases are of little practical use in determining whether the subpoena in the present case runs afoul of the Fourth Amendment.

Consequently, it is wrong to conclude that because the IRS may successfully obtain enforcement of a subpoena for personal financial documents of individual taxpayers, other agencies may do the same without compliance with the Fourth Amendment standard articulated by this Court in *Morton Salt*. Nor do the IRS cases support the notion that financial records are *per se* less private than other documents. As Mr. Justice Brennan noted in his dissent in *United States v. Miller*, 425 U.S. 435, 451 (1976), favorably quoting the opinion of the Court of Appeals in that case, personal financial records reveal "many aspects of [an individual's] personal affairs, opinions, habits, and associations. Indeed, the totality of bank records provides a virtual current biography."

Since a citizen has a legitimate expectation of privacy in privately held financial papers, the question is not whether the individual will suffer adverse effects from its disclosure, but whether the government has shown adequate justification for searching the documents. The frequently quoted language from the Supreme Court's holding in *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 479 (1894) provides an apt reminder of the critically important constitutional protections at issue here:

> [O]f all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his *private affairs, books, and papers* from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.

This Court should not *sub silentio* permit the dilution of Fourth Amendment protection traditionally afforded individuals by declining to review the rulings of the lower courts erasing the bright constitutional line between an individual's right of privacy and a corporation's admittedly lesser right. The Second Circuit's rationale of changed economic climates and different priorities is a patently weak justification for declining to follow *Morton Salt*. The Supreme Court should grant certiorari on this important Fourth Amendment question to reaffirm the vitality of its holding in *Morton Salt*, protecting the individual's right of privacy in his personal financial documents in a non-IRS context.

II. THE PETITION SHOULD BE GRANTED TO CLARIFY THE CONFUSION EXTANT IN THE LOWER COURTS REGARDING THE STANDARD OF CONSTITUTIONAL SCRUTINY TO BE APPLIED TO AN ADMINISTRATIVE AGENCY SUBPOENA AIMED AT PERSONAL FINANCIAL RECORDS OF A FORMER BANK DIRECTOR

This Court's guidance is needed to clarify the confusion that exists in the lower courts regarding the constitutional standard applicable to a sweeping administrative agency subpoena directed at an individual's personal confidential financial records. Such confusion is illustrated by the Second Circuit's opinion at bar and recent developments in the First Circuit in *Parks v. FDIC*, 65 F.3d 207 (1st Cir. 1995) (revers-

ing district court order of enforcement), *opinion withdrawn, reh'g en banc granted* (Nov. 20, 1995) (withdrawn opinion available at *Parks v. FDIC*, No. 94-2262, 1995 WL 529629 (1st Cir. Sept. 13, 1995)), *on reh'g*, (Mar. 15, 1996) (vacating district court order of enforcement on ground of changed circumstances, dismissing enforcement proceeding without prejudice) and in the Third Circuit in *FDIC v. Wentz*, 55 F.3d 905 (3d Cir. 1995).

In *Parks*, the First Circuit reversed the district court's order enforcing an FDIC subpoena substantially identical to the one at bar. In so holding, Chief Judge Torruella observed:

> The *Morton Salt* Court did hold—in the section of the opinion which actually concerned the Fourth Amendment—that the FTC need not establish wrongdoing by the respondent corporations in order to subpoena their financial documents. The Court based this decision on the fact that corporations do not merit the same degree of Fourth Amendment protections as private individuals. . . .
>
> We think the clear import of *Oklahoma Press* and *Morton Salt* is that the standard for judicial enforcement of administrative subpoenas of a private citizen's private papers is stricter than that for corporate papers. . . . the Supreme Court has never extended the lenient *Morton Salt* standard for administrative subpoenas of corporate records to private records. Rather, the court has always couched the standard in the context of the corporate status of the subpoena target.

Parks v. FDIC, 1995 WL 529629, at *5 (quotation and footnote omitted).

The First Circuit wrote:

> The FDIC asserts the power to rummage through the financial papers of private citizens based on nothing more than the hope that illegal conduct might be

> revealed. We do not think that Ms. Parks waived her Fourth Amendment interest in her private papers by serving on the board of directors of a federally regulated bank. *See In re Sealed Case*, 42 F.3d at 1418. Moreover, we think it inconceivable that the Framers of the Constitution, who knew so well and cared so deeply about arbitrary governmental interference in private citizen's affairs, would countenance such unbridled power in the hands of an administrative agency.

Id. at *7.

In addressing the "quantum of suspicion" required for judicial enforcement of an FDIC subpoena directed at an individual's personal financial documents, the First Circuit recognized that reasonableness is the "touchstone" of the Fourth Amendment. The court weighed "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983); *Camara*, 387 U.S. at 534-35 (1967)). As a result, the First Circuit concluded:

> [t]here is a strong public interest in promptly resolving the affairs of insolvent banks on behalf of their creditors and depositors. Moreover, the FDIC's legislative mandate is clear with respect to avoiding fraudulent transfers, attaching assets, and generally asserting claims against directors and officers of failed financial institutions. 12 U.S.C. §§ 1821(d)(17), 1821(d)(18), 1821(k). On the other hand, private citizens have a significant expectation of privacy in their personally held financial papers. Indeed, "papers" are specifically listed in the text of the Fourth Amendment.
>
> We think the significant public interest in resolving the affairs of failed institutions, as reflected by the FDIC's legislative mandate, deserves considerable weight. Consequently, we conclude that the "balancing

> of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). In such cases, the Supreme Court has often utilized a reasonableness standard which requires the government to articulate a reasonable suspicion of wrongdoing by the target of the search. *See, e.g., id.* at 342; *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-56 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968). We think this standard strikes the appropriate balance between protecting private citizens' private papers and enabling the FDIC to fulfill its statutory mandate.

Id. at *8 (footnote omitted).

Upon a grant of rehearing, the court withdrew its opinion. Upon rehearing, the First Circuit did not decide the substantive issue posed nor indicate any disagreement with its original panel's decision. Instead, the First Circuit took cognizance of the subsequently commenced litigation by the FDIC against Parks and the other directors and vacated the lower court's enforcement order on the ground of "changed circumstances" with the consent of the parties.[7]

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[7] The First Circuit's *en banc* order, dated March 15, 1996, provides in its entirety:

> Upon consideration of the parties' supplemental briefs in response to our February 16, 1996 order, we vacate the district court's enforcement order on the grounds of changed circumstances. Without passing on the merits, we remand to the district court with the instruction that the enforcement proceeding be dismissed without prejudice to a subsequent FDIC decision to undertake, if it so chooses, a new enforcement action in district court with a new subpoena. We only add that both parties are in favor of the action we take today.

In *FDIC v. Wentz*, 55 F.3d 905 (3d Cir. 1995), the Third Circuit affirmed the district court's order, which denied enforcement of the broad-based FDIC subpoena and ordered production only of two severely circumscribed categories of documents. The Court of Appeals implicitly balanced the FDIC's need for the documents against the privacy interests of the former bank directors faced with the substantially narrowed subpoena, and recognized that "[w]hen personal documents of individuals, as contrasted with business records of corporations, are the subject of administrative subpoena, privacy concerns must be considered." *Id.* at 908 (citing *Whalen v. Roe*, 429 U.S.589, 599 (1977)).[8]

The approach of both the First and Third Circuits is in sharp contrast to the Second Circuit's decisions at bar and in *In re McVane*, 44 F.3d 1127 (2d Cir. 1995).

Litigation over the enforcement of subpoenas issued for personal financial records of former directors of insolvent banks has been extensive and warrants this Court's articulation of a uniform constitutional standard consonant with *Morton Salt*. *See, e.g., In re McVane*, 44 F.3d 1127, 1138 n.3 (2d Cir. 1995) (noting "individuals enjoy greater rights of privacy than do corporations" but nonetheless applying the more lenient *Morton Salt* standard relevant to corporations to a bank director's confidential private financial records); *FDIC v. Wentz*, 55 F.3d 905, 908-09 (3d Cir. 1995) (applying the more lenient *Morton Salt* corporation standard to narrowed subpoenas despite recognition of individuals' privacy concerns; balancing need of FDIC against individuals' privacy

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[8] The *Wentz* court did not resolve whether an articulable suspicion of individualized wrongdoing need be alleged because the directors did not show that the documents sought were sensitive and that disclosure would adversely affect them. 55 F.3d at 909. However, under the traditional Fourth Amendment balancing test, if an individual has a reasonable expectation of privacy, the government must establish its justification for the search. The Third Circuit's analysis put the cart (harm from disclosure) before the horse (the right to disclosure).

concerns with no requirement of articulable suspicion of individualized wrongdoing); *RTC v. Walde*, 18 F.3d 943 (D.C. Cir. 1994) (relying on standard set forth for corporation as against former bank director); *In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1415 (D.C.Cir. 1994) (same).

Accordingly, this Court should grant the petition to provide guidance to the lower courts and stem the flood of litigation in the lower courts as a result of the failure of the lower courts to adhere to this Court's holding in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 866—August Term, 1995

(Argued October 18, 1995 Decided February 21, 1996)

Docket No. 95-6187

IN RE: SUBPOENA OF ROGER GIMBEL BY FDIC AS RECEIVER FOR FIRST NEW YORK BANK FOR BUSINESS.

ROGER GIMBEL,

Petitioner-Appellant,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent-Appellee.

Before:

MESKILL, MAHONEY and WALKER,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Martin, *J.*, denying appellant's motion on Fourth Amendment grounds to quash the Federal Deposit Insurance Corporation's subpoena *duces tecum* of his financial records and granting the FDIC's cross-motion to enforce the subpoena.

Affirmed.

ARTHUR M. HANDLER, New York City (Robert S. Goodman, Eileen P. McCarthy, Burns Handler & Burns LLP, New York City, of counsel) *for Appellant.*

LAWRENCE H. RICHMOND, Federal Deposit Insurance Corporation, Washington, D.C. (Ann S. DuRoss, Assistant General Counsel, Colleen B. Bombardier, Senior Counsel, Federal Deposit Insurance Corporation, Washington, D.C., of counsel), *for Appellee.*

MESKILL, *Circuit Judge*:

This is an appeal from a final order of the United States District Court for the Southern District of New York, Martin, *J.*, denying Roger Gimbel's motion to quash a Federal Deposit Insurance Corporation (FDIC) administrative subpoena of Gimbel's personal financial records and granting the FDIC's cross-motion to enforce its subpoena.

BACKGROUND

Roger Gimbel was a director of the First New York Bank for Business (FNYBB) from 1986 until 1992 when the bank failed. The FDIC took over as receiver for the failed bank and through an administrative subpoena *duces tecum* seeks to determine the potential liability of Gimbel to FNYBB/FDIC and his ability to pay any judgment obtained. Gimbel argues that the FDIC subpoena must be quashed because it lacks the requisite articulation of suspicion of liability required by the Fourth Amendment, and because it seeks information irrelevant to the stated purposes of the FDIC investigation of him and thus is outside the FDIC's statutory authority. The district court found that the FDIC made an "adequate showing" to support its subpoena. We have jurisdiction pursuant to 28 U.S.C. § 1291.

The FDIC subpoena of Gimbel's personal records instructed Gimbel to provide the FDIC the following:

1. Your current financial statement and all financial statements listing your assets and liabilities, (alone or with others).

2. All credit applications submitted by you, alone or with others, to any depository institution or any other person or entity.

3. All records prepared, generated, or received on or after June 8, 1995, referring or relating to any account in any depository institution maintained by you or any member of your immediate family, or over which you or they have exercised control, or as to which you or they are or were a signatory, or in which you or they had or have a financial interest, including but not limited to: (a) checking and sav-

ings account statements; (b) records of loans made or received; (c) records of certificates of deposit and other time deposit items purchased or redeemed; (d) records of safe deposit boxes; (e) cancelled checks.

4. All records prepared, generated, or received on or after June 8, 1995, referring or relating to the source and amount of any income received by you or on your behalf, including but not limited to all wages, salary, commissions, bonuses, interest and dividend payments, and any other form of income received by you.

5. All Federal, state and local tax returns filed by you either individually or jointly with another, along with all forms and schedules filed with such returns.

6. All records prepared, generated, or received on or after June 8, 1995, referring or relating to stocks, bonds, securities or other investments currently owned by you individually or with others, including but not limited to any statements showing their value.

7. All documents that reflect, refer or relate to any financial, real or personal property transactions in which you, or anyone acting on your behalf, or under your control or influence, have been involved, (except as the attorney, employee or agent of another party on transactions in which you had no personal interest), having a value of $5,000 or more, per person or organization per year, including, but not limited to, the following:

   a. all real and personal property purchases, sales or transfers, with or without consideration;

   b. all trust participations;

c. mortgages, trusts or other liens on security interests obtained or supplied on any third party;

d. lawsuits; and

e. repossessions and returns.

8. All documents referring or relating to any transfer of assets exceeding $5,000 to any entity, account, place or person located outside the United States of America.

9. All records referring or relating to any interest you hold in any real[,] personal or other type of property exceeding $5,000 in value not described above.

10. All policies which insure you against liability, unless the policy expressly excludes all coverage for directors and officers. Examples of policies which may be required to be produced include D&O insurance of a failed institution, insurance covering you as a director or officer of a corporation other than the failed institution, comprehensive general liability (CGL) policies, homeowner's policies, personal umbrella policies.

DISCUSSION

As we noted in *In re McVane*, 44 F.3d 1127 (2d Cir. 1995), the statute that empowers the FDIC to issue subpoenas "places few restrictions on that power." *Id.* at 1134. The statute provides that:

> The Corporation may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determin-

> ing any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 1818(n) of this title.

12 U.S.C. § 1821(d)(2)(I)(i). Section 1818(n) provides that the FDIC shall have the power to, among other things, issue, revoke, and quash subpoenas *duces tecum*. 12 U.S.C. § 1818(n). The only statutory limit on the subpoena power of the FDIC is that the subpoenas be issued " 'for purposes of carrying out any power, authority, or duty with respect to an insured depository institution.' " *McVane*, 44 F.3d at 1134 (quoting § 1821(d)(2)(I)(i)).

Limitations on the FDIC's sweeping power to subpoena the personal financial records of the former directors and officers of failed savings and loans[1] come from two sources. First, courts have interpreted the FDIC's seemingly unlimited grant of authority to issue subpoenas as requiring a preliminary showing of suspicion of liability of the subpoena respondent for certain inquiries. For instance, in *RTC* v. *Walde*, 18 F.3d 943 (D.C. Cir. 1994), the District of Columbia Circuit held that Congress did not authorize the FDIC to subpoena personal financial records of directors for the purpose of determining the cost-effectiveness of litigation, unless the FDIC could articulate a suspicion of liability. *Id.* at 949; *McVane*, 44 F.3d at 1140. A second limitation on the FDIC's subpoena power is, of course, the Fourth Amendment's prohibition of unreasonable searches. In *McVane*, we held that the Fourth Amendment would be

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[1] For a discussion of the course of a typical FDIC investigation, *see* James T. Pitts, *et al.*, *FDIC/RTC Suits Against Bank and Thrift Officers and Directors—Why Now, What's Left?*, 63 Fordham L. Rev. 2087, 2094-95 (1995).

offended by the enforcement of a FDIC subpoena for the personal financial records of family members of the directors of a failed bank unless the FDIC could show a need for those records beyond their mere relevance to the FDIC investigation. *McVane*, 44 F.3d at 1138.

Absent one of these limitations, the FDIC need only satisfy the statutory standard for the enforcement of administrative subpoenas. Accordingly, the FDIC must show that its investigation is being conducted pursuant to a legitimate purpose, that the inquiry is relevant to that purpose, that the information is not already within the FDIC's possession and that the proper procedures have been followed. *Powell* v. *United States*, 379 U.S. 48, 57-58 (1964).

A. *The Fourth Amendment Claim*

While the Fourth Amendment's prohibition against unreasonable searches applies to administrative subpoenas, the Supreme Court has held that such subpoenas are, at best, "constructive searches." *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 202-08 (1946). As such, administrative subpoenas do not require full probable cause for enforcement. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950). The *Morton Salt* Court held that as long as subpoenaed information was "reasonably relevant to the agency investigation," "not too indefinite" and "within the authority of the agency," the Fourth Amendment was not offended. *Id.* at 652.

Gimbel argues that because *Morton Salt* involved an administrative subpoena for corporate records, its "reasonable relevance" standard cannot be the Fourth Amendment standard applicable to the FDIC's subpoena of his personal records. Gimbel relies on language in

Morton Salt itself. The Supreme Court stated, in the context of a challenge to a Federal Trade Commission order requiring the Morton Salt Company to file reports with it, that although corporations have certain privacy interests, they "can claim no equality with individuals in the enjoyment of a right to privacy." *Id.* at 652. Thus, the argument goes, if a subpoena for corporate records requires a showing of reasonable relevance, then a subpoena for an individual's personal financial records must require some higher showing. This argument was recently accepted by a divided panel in *Parks* v. *FDIC*, No. 94-2262, 1995 WL 529629 (1st Cir. Sept. 13, 1995), but that opinion was subsequently vacated and rehearing *in banc* granted. Order of Court, Nov. 20, 1995. Appellant had never relied on *Parks* as binding authority on this appeal, but rather argued that the holding in *Parks* is consistent with our decision in *McVane*. Although *Parks* was vacated, we will address the panel and dissenting opinions therein in analyzing Gimbel's claims. The *Parks* majority stated that for enforcement of an administrative subpoena for privately held personal financial records, the Fourth Amendment requires that the agency "articulate an individualized suspicion of wrongdoing by the petitioner." *Parks*, 1995 WL 529629, at *8.

We addressed that same question in *McVane*, 44 F.3d 1127, and recognized and interposed both statutory and constitutional limitations on the FDIC's power to subpoena personal financial records. *McVane* involved an FDIC subpoena for financial records of directors of a failed bank and the records of the directors' families. Much of our discussion focused on the portions of the subpoena relating to the financial records of the directors' family members. *Id.* at 1137-39. In connection with that discussion, we recognized, as the Supreme Court did

in *Morton Salt*, that the Fourth Amendment generally affords more protection to individuals than corporations, and we held that persons who are not targets of investigations are generally accorded even greater protection from administrative subpoenas. *Id.* at 1137. Thus we held that those portions of the subpoena relating to the personal financial records of the family members of directors required "some showing of need for the material sought beyond its mere relevance to a proper investigation." *Id.* at 1138 (quoting *Federal Election Comm'n* v. *Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987) (per curiam). We *rejected* the directors' contention, however, that *all* of the FDIC's requests were subject to this "intermediate level of scrutiny." *Id.* at 1138 n.3. Rather, we noted that "[i]t is well settled that, absent countervailing considerations, the standard to be applied to administrative subpoenas *duces tecum* is that set out in *Morton Salt* and its progeny." *Id.*

Appellant argues that this last proclamation in *McVane* is dictum, and thus there is an open question in this Circuit as to whether the "reasonable relevance" standard of *Morton Salt* applies to administrative subpoenas for the privately held personal financial records of actual targets. Gimbel claims that *McVane*'s holding is limited to the issue of subpoenas for family members' information. The FDIC claims that *McVane* footnote 3 is a holding and thus controlling.

The subpoena at issue in *McVane* requested the financial records of the actual directors as well as those of their families, so the issue of the enforceability of the FDIC subpoena of the directors' records was properly and squarely before the *McVane* panel. Our joining the D.C. Circuit in adopting a stricter standard when evaluating FDIC subpoenas seeking directors' financial

records solely for the purposes of determining which of the directors are worth suing, *id.* at 1139-40 (citing *Walde*, 18 F.3d at 949), does not mean that we did not consider the propriety of the other FDIC purposes and the appropriate showing required. We held in *McVane* that to enforce subpoena provisions intended only to determine the cost-effectiveness of bringing suit, the FDIC must "articulate specific grounds for its suspicion of liability," and we held that the FDIC had met that standard. *McVane*, 44 F.3d at 1140.

We also affirmed the enforcement of the director-related provisions. *Id.* at 1141. Thus, we necessarily found the director-related portions of the subpoena to be sufficient under the Fourth Amendment. In other words, in holding that only the portions of the subpoena that sought the records of family members and the portions that sought only cost-effectiveness information would be held to a higher standard than *Morton Salt*, we implicitly applied *Morton Salt*'s "reasonable relevance" standard to the remaining portions of the subpoena. Thus footnote 3 of *McVane*, indicating that *Morton Salt* applies to subpoenas for directors' personal financial records, is not dictum and is controlling on this issue.

Even if we believed that *McVane* did not control this case, we are not persuaded by the majority's reasoning in *Parks* that *Morton Salt*'s reasonable relevance standard cannot apply to administrative subpoenas for directors' personal financial records. *Parks*, 1995 WL 529629, at *5. The *Parks* majority claimed to exercise simple logic and suggested that we missed the boat in *McVane* by relying on *Walde*, 18 F.3d 943, and, like the *Walde* Court, by failing to distinguish between subpoenas for the financial records of individuals and those of corporations. *Parks*, 1995 WL 529629, at *5. The *Parks*

majority reasoned that if corporations are protected by *Morton Salt*'s reasonable relevance standard, and if individuals are entitled to greater protection than are corporations, then there must be a Fourth Amendment standard stricter than reasonable relevance where personal financial records are subpoenaed. *Parks*, 1995 WL 529629, at *8.

Although this argument has surface appeal, it does not withstand careful scrutiny. We agree with dissenting Judge Selya that the *Parks* majority relied too heavily on the distinction between corporate and personal financial affairs. *Parks*, 1995 WL 529629, at *10 (Selya, *J.*, dissenting). Our holding in *McVane* recognized the Supreme Court's teachings that corporations are not entitled to the same level of Fourth Amendment protection that is afforded individuals, but also recognized that courts have continued to apply the reasonable relevance test to administrative subpoenas for personal financial records. *See McVane*, 44 F.3d at 1137; *see also Walde*, 18 F.3d at 946-48; *SEC* v. *Kaplan*, 397 F.Supp. 564, 567, 570 (E.D.N.Y. 1975).

Although the *Parks* majority claimed that the Supreme Court had never applied the *Morton Salt* standard to a subpoena for the financial records of an individual, *Parks*, 1995 WL 529629, at *5, Judge Selya correctly noted that the Supreme Court did just that in *Ryan* v. *United States*, 379 U.S. 61 (1964). In *Ryan*, the Court enforced an IRS subpoena of a taxpayer's personal financial records for the reasons stated in *United States* v. *Powell*, 379 U.S. 48 (1964), decided the same day. *Ryan*, 379 U.S. at 62. *Powell* held that *Morton Salt*'s reasonable relevance standard, not probable cause, was the proper standard under which to review an IRS subpoena of corporate tax records. Thus, the *Ryan* Court, by

enforcing the IRS subpoena for the reasons stated in *Powell*, held that the *Morton Salt* standard was also proper in the *personal* records context.

We also agree with Judge Selya that the language in *Morton Salt* and *Oklahoma Press*, indicating that corporations enjoy less protection than do individuals under the Fourth Amendment is, at least in the context of administrative subpoenas, representative of an era that was still coming to terms with the modern regulatory state. *Parks*, 1995 WL 529629, at *10 (Selya, *J.*, dissenting). The decisions of the Supreme Court in *Morton Salt* and *Oklahoma Press* reveal a Court struggling to reconcile the Fourth Amendment and the emerging, post-war regulatory state, and finding some additional support for its decision in the fact that the party invoking the Fourth Amendment was a corporation. The *Powell-Ryan* line of cases removed many of the chains that bound agency investigations. *See, e.g., United States* v. *McAnlis*, 721 F.2d 334, 336 (11th Cir. 1983) (applying *Powell* standard to IRS summons for personal tax records), *cert. denied*, 467 U.S. 1227 (1984); *United States* v. *Roundtree*, 420 F.2d 845, 851 (5th Cir. 1969) (holding that "we are satisfied that the Commissioner meets the standard of probable cause when he meets the requirements of *Powell*").

The Court's decisions in *Powell* and *Ryan* evince a more modern view of the regulatory state, and one that recognizes that Congress may authorize administrative agencies, such as the IRS and Federal Trade Commission and, as in this case, the FDIC, to investigate suspected wrongdoing in their respective fields of expertise. These agencies, when authorized by Congress, may utilize their subpoena power to obtain information that is relevant to a legitimate area of inquiry. Obviously, this does not

mean that the FDIC's congressional authorization to investigate bank failures and issue subpoenas in furtherance of its investigation insulates it from Fourth Amendment scrutiny. We recognize, however, that the Supreme Court, in *Oklahoma Press*, held that the Fourth Amendment standard in the context of agency subpoenas is ultimately one of reasonableness, *Oklahoma Press*, 327 U.S. at 208, and that the Court, through its decisions in *Powell* and *Ryan*, has held that, as Judge Selya put it, "administrative subpoenas seeking [financial] records are per se reasonable as long as they are lawfully authorized, relevant, sufficiently specific, and procedurally unblemished." *Parks*, 1995 WL 529629, at *11 (Selya, *J.*, dissenting); *Powell*, 379 U.S. 48; *Ryan*, 379 U.S. 61. We agree with Judge Selya that there is no reason to categorically restrict this standard to *corporate* financial records. *Parks*, 1995 WL 529629, at *11.

The underlying rationale in affording corporations a lesser degree of Fourth Amendment protection than normally accorded to individuals is that a corporation, as a creature of the state, born of the law of the state, and whose very existence is defined by the state, has limited grounds for a "reasonable expectation of privacy," *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (Harlan, *J.*, concurring), in its corporate financial records. *Morton Salt*, 338 U.S. at 651-52. Similarly, individuals, by the nature of their chosen profession, might not hold a "reasonable expectation of privacy" in certain areas of their personal affairs.[2]

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[2] *See Vernonia School Dist. 47J* v. *Acton*, 115 S.Ct. 2386, 2393 (1995) ("Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.") (citing *Skinner* v. *Railway Labor Executives Ass'n*, 489 U.S. 602, 627 (1989) (holding constitutional a statute making railroad work-

As we stated in *McVane*, "absent countervailing considerations, the standard to be applied to administrative subpoenas *duces tecum* is that set out in *Morton Salt* and its progeny." *McVane*, 44 F.3d at 1138 n.3. The countervailing considerations we referred to in *McVane* are those that arise where, based on the surrounding circumstances, a subpoena respondent maintains a reasonable expectation of privacy in the materials sought by the subpoena. Unless a reasonable expectation of privacy of a greater magnitude than at least that held by an individual taxpayer in his or her personal financial records is demonstrated, *Ryan*, 379 U.S. 61 (enforcing subpoena for taxpayer's personal financial records on showing of relevance), the Fourth Amendment does not require any showing beyond the reasonable relevance of the materials sought.

Such a situation arose where the FDIC subpoenaed the personal financial records of the family members of the directors of a failed bank in *McVane*. We found that the subpoena respondents retained a reasonable expectation of privacy that merited a more stringent standard than reasonable relevance. *McVane*, 44 F.3d at 1137-38.

In analyzing the reasonableness of the family members' expectations of privacy, we stated that non-parties will generally be accorded more protection from sweeping administrative subpoenas under the rationale that "[i]ndividuals . . . who do not participate in corporate matters that might reasonably become the subject of government inquiry have a greater 'reasonable expectation of privacy' in their personal financial affairs than do those individuals who do participate in such matters."

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ers subject to urinalysis without warrant or individualized suspicion), and *United States* v. *Biswell*, 406 U.S. 311, 316 (1972) (upholding statutorily authorized search of pawn shop licensed to sell firearms made without warrant or individualized suspicion)).

McVane, 44 F.3d at 1137 (citations omitted) (quoting *Katz*, 389 U.S. at 360 (Harlan, *J.*, concurring)). The family members in *McVane* had no business relations with the director to whom they were related. *Id.* at 1138. To the contrary, the relationships were purely personal. We stated that "[a] person does not involve him or herself in matters forseeably the object of agency inquiry simply by being a member of another's family." *Id.* Thus we held that "[c]onjugal or familial association with a corporate participant does not, by itself, strip an individual of his or her expectation of privacy," *id.*, and we required the FDIC to make a showing of need for the materials beyond their mere relevance. *Id.*

We find no comparable "reasonable expectation of privacy" here. In fact, the appellant in this case is the type of person, by nature of his profession, who should least expect his personal financial records to remain private. Indeed the Supreme Court has noted that "adults . . . who choose to participate in a 'closely regulated industry' . . . have reason to expect intrusions upon normal rights and privileges, including privacy." *Vernonia School Dist. 47J* v. *Acton*, 115 S.Ct. 2386, 2393 (1995).

As every bank director should reasonably be aware, federal and state regulation of the banking industry is intense. Like an ordinary public corporation, the government regulates the relations between the directors and the shareholders. Unlike many other industries, though, in banking, there is additional and extensive governmental regulation of the relationship between banks and their depositors, including government insurance of the funds deposited. In fact, the history of the industry, since its collapse in the 1930s and subsequent regulation,[3]

[3] *See* Michael P. Battin, Note, *Bank Director Liability Under FIRREA*, 63 Fordham L. Rev. 2347, 2370-77 (1995) (tracing the beginnings and

should indicate to any persons assuming the responsibilities of directorship that they will constantly be dealing with the government and with government inquiries. These conditions indicate that Gimbel, as a person who was involved in "matters that were likely to be the object of governmental inquiry," *McVane*, 44 F.3d at 1137 (quoting *United States* v. *Arthur Young & Co.*, 677 F.2d 211, 216 (2d Cir. 1982), *aff'd in part and rev'd in part on other grounds*, 465 U.S. 805 (1984), may not now claim that he holds an expectation of privacy of a level demanding a standard more demanding than the *Morton Salt* standard.

Absent circumstances not present in this case, the Fourth Amendment requires no showing beyond the standard articulated in *Morton Salt* where the FDIC seeks the personal financial records of a director of a failed bank. *McVane*, 44 F.3d at 1138 n.3. Provided that the investigation by the FDIC of the former directors of the failed First New York Bank for Business is within its statutory authority, the FDIC need not articulate an individualized suspicion of wrongdoing to obtain enforcement of its administrative subpoena *duces tecum* as suggested by Gimbel. Rather the FDIC need only make a showing that the materials sought are, in its view, "reasonably relevant" to its investigation. *Morton Salt*, 338 U.S. at 652.

B. *Application*

We now turn to the question of whether the materials sought by the FDIC subpoena satisfy the *Morton Salt* standard as interpreted by us in *McVane*. Applying *McVane*, we must determine only if "the inquiry is

development of government regulation of the banking industry from the 1930s to the present).

within the authority of the [FDIC], the demand is not too indefinite and the information sought is reasonably relevant." *McVane*, 44 F.3d at 1135 (quoting *Morton Salt*, 338 U.S. at 652) (emphasis omitted). In *McVane*, after instituting an intermediate level of review for the records of the family members of the target, we applied the *Morton Salt* reasonable relevance inquiry with one further deviation. For records sought solely to determine a director's net worth for the purpose of determining the cost-effectiveness of bringing suit, the FDIC must set forth "at least an articulable suspicion that [the director] is liable to the failed institution." *Id.* at 1139 (quoting *Walde*, 18 F.3d at 949) (emphasis omitted). This requirement is not grounded in the Fourth Amendment, but rather in the grant of statutory authority to the FDIC to issue subpoenas. *Id.* at 1140 ("Congress . . . did not thereby 'intend[ ] to authorize the [FDIC] to browse among the private papers of citizens whose only sin had been to serve as officers or directors of defunct S&Ls.' ") (quoting *Walde*, 18 F.3d at 949).

The initial determination of what information is reasonably relevant is left to the investigating agency. The district court must enforce the subpoena unless the agency's determination of relevancy is "obviously wrong," *McVane*, 44 F.3d at 1135 (quoting *Walde*, 18 F.3d at 946), and we must accept any determinations made by the district court that are not clearly erroneous. *Id.* Thus wide latitude is given to the FDIC in determining relevancy. Gimbel challenges the relevancy of the subpoenaed materials as it applies to the four stated purposes of the Order of Investigation.

The FDIC Order of Investigation stated four purposes of its investigation. The stated purposes were to determine (1) whether the former FNYBB directors may be

liable as a result of their actions and/or failures to act, (2) whether pursuit of litigation against the directors would be cost-effective in light of the directors' ability to pay any judgment obtained, (3) whether the FDIC should seek to avoid any asset transfers by the directors, and (4) whether the FDIC should attach the directors' assets. If each provision of the subpoena seeks information reasonably relevant to purposes one, three or four, we need not reach the question of the propriety of information as it relates to purpose two. As we stated in *McVane*, "[e]ven if the Directors can show that one purpose underlying the subpoenas is improper, enforcement of the subpoenas is called for nonetheless so long as other, proper purposes exist." *Id.* at 1139.

The showing made by the FDIC in support of its subpoena *duces tecum* consisted of an affidavit offered by an FDIC investigator, David A. Leahy. The affidavit stated, in pertinent part:

> 8. I have reviewed certain losses sustained by the Bank resulting from insider loans approved and/or ratified by certain directors of the F[NY]BB, including Mr. Gimbel. The insider loans have resulted in losses of approximately 40 million dollars to the Bank. These loans were originated, approved and/or ratified by the directors after the Bank had received regulatory warnings regarding its loan practices.
>
> 9. The extent and nature of the losses sustained by the Bank on the insider loan transactions suggest that the directors, including Mr. Gimbel, were grossly negligent and violated their fiduciary duty of loyalty to the Bank by approving and/or ratifying the insider loans.
>
> . . . .

> 11. The records sought by the subpoena *duces tecum*, largely current financial documents, are relevant to the investigation directed by the Order of Investigation, and are not already in the possession of the FDIC. The FDIC's receipt and examination of these documents is necessary to allow the FDIC to determine whether Mr. Gimbel may be liable as a result of his actions or inaction; whether Mr. Gimbel may have transferred assets under circumstances in which the FDIC should attempt to avoid the transfers; whether the FDIC should seek to attach any assets of Mr. Gimbel and; whether any litigation initiated by the FDIC against Mr. Gimbel would be cost-effective.

We address Gimbel's challenges to the showings made by the FDIC regarding the relevance of his personal financial records to each of the FDIC's stated purposes in turn.

1. *Determining Gimbel's Liability*

Gimbel claims that because he never received any personal loans from FNYBB, his personal financial records can have no relevance to the FDIC's investigation of improper insider loans. FDIC correctly points out that there are many ways a director can benefit from approving improper loans, not all of which involve direct loans to the director. For instance, a kickback scheme could be uncovered based on payments to Gimbel from those who may have received improper loans. Under the *McVane* standard, no individualized suspicion need be advanced by the FDIC, rather the agency may request the information merely to assure themselves the law has not been broken. *McVane*, 44 F.3d at 1135 (analogizing the

agency subpoena power to that of grand juries). The FDIC's desire to assure itself that Gimbel was engaged in no wrongdoing is sufficient under *McVane* and *Morton Salt*. This sweeping power is what led the *Parks* majority to demand an "articulable and individualized suspicion" of wrongdoing before enforcing the subpoena. While we understand the *Parks* majority's concerns regarding the vesting of such broad power in the FDIC, Congress has given it to the FDIC, and its proper exercise is not unreasonable under the Fourth Amendment.

2. *Whether to Avoid Asset Transfers*

Appellant claims that the FDIC's authority to seek his records for purposes of determining whether to avoid certain asset transfers is limited to obtaining information regarding assets wrongfully obtained from FNYBB on the grounds that the FDIC's statutory power to avoid asset transfers is limited to those transfers involving assets "wrongfully obtained" from FNYBB. The District of Columbia Circuit rejected this argument in *Linde Thomson Langworthy Kohn & Van Dyke* v. *RTC*, 5 F.3d 1508 (D.C. Cir. 1993), based on the plain language of the authorizing statute, 12 U.S.C. § 1821(d)(17)(A). The statute reads, in pertinent part:

> The [FDIC] . . . may avoid a transfer of *any interest* of an institution-affiliated party . . . that was made within 5 years of the date on which the [FDIC] was appointed . . . receiver if such party . . . made such transfer . . . with the intent to hinder, delay, or defraud the [FDIC].

12 U.S.C. § 1821(d)(17)(A). The statute clearly authorizes the FDIC to avoid any transfer made by Gimbel

with the intent to defraud the FDIC. Thus, the FDIC's investigative powers extend to any transfer. *Linde Thomson*, 5 F.3d at 1517. Gimbel's reliance on the statements of Congressman Schumer to the effect that the statute is intended to allow the FDIC to freeze assets "wrongfully obtained," 136 Cong. Rec. E3684-02 (1990) (remarks by Representative Schumer), does not justify a departure from the plain language of the statute, which authorizes the avoidance of any asset transfer intended to hinder the FDIC's investigation.

3. *Whether to Attach Assets*

Gimbel argues that because the FDIC has no authority to freeze his assets before proving to a court that there is a likelihood of the FDIC's success on the merits, that FDIC has no right to investigate whether to freeze his assets until a preliminary finding of liability has been made. The District of Columbia Circuit in *Walde* considered the propriety of the FDIC's stated purpose of making a determination whether to freeze McVane's assets and held that it was proper for the FDIC to investigate the possibility of a freeze even though no specific allegation of wrongdoing had been made. *Walde*, 18 F.3d at 947. The *Walde* Court stated that "[t]o require the RTC to make such a preliminary determination of liability before subpoenaing documents . . . would seriously hamper the agency's ability to locate and save a failed institution's assets." *Id.*; *RTC* v. *Greif*, 906 F.Supp. 1446, 1454 (D. Kan. 1995). Gimbel's records are reasonably relevant to the FDIC's proper stated purpose of determining whether to freeze his assets. The FDIC's authorizing statute gives it the power to attach assets, and the FDIC included such purpose in its Order of Investigation. Clearly, the asset information sought is

directly related to the decision whether to attach assets. *Linde Thomson*, 5 F.3d at 1517.

4. *Cost-Effectiveness of Bringing Suit*

McVane set a higher standard that the FDIC must meet in justifying subpoenas issued solely to determine the cost-effectiveness of litigation against a target. *McVane* held that the agency must "articulate specific grounds for its suspicion of liability." *McVane*, 44 F.3d at 1140. In *McVane*, an FDIC inspector submitted an affidavit declaring that the Bank in question lost $9 million due to improper insider loans that were originated and approved by the directors after they had been warned by regulatory agencies about their practices. The inspector further declared that another director (not McVane) had transferred millions of dollars worth of real estate to family members after the Bank failed. *Id.* We held that this was "more than sufficient to support the FDIC's request for information concerning [all] the Directors' net worth." *Id.*

The facts in this case are similar to those presented in *McVane*. Inspector Leahy declared many of the same grounds for suspicion in this case, namely, that the board of directors originated and approved improper insider loans that resulted in losses of $40 million, that these loans were approved after warnings against such practices were received from regulatory agencies, and that the nature of the losses suggest that the directors were grossly negligent in their actions and/or failures to act. The lack of an allegation in this case that a director transferred large amounts of real estate to a family member does not distinguish *McVane* in any meaningful way. It might be argued that one director's transfer of millions of dollars in real estate to family members suggesting

the possibility of widespread director misconduct distinguishes *McVane* from the case at hand. This argument is not persuasive. The allegations of improper approval of loans by FNYBB directors are sufficient to cast suspicion of impropriety on all of the directors even without the asset transfer alleged in *McVane*. The lack of the additional allegation of wrongdoing present in *McVane* is not enough to remove this case from *McVane*'s authority. That standard was met here.

CONCLUSION

For the reasons stated above, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed July 20, 1995
M8-85

IN RE SUBPOENA OF ROGER GIMBEL BY FDIC AS RECEIVER FOR FIRST NEW YORK BANK FOR BUSINESS

ORDER

JOHN S. MARTIN, JR., *District Judge*:

The motion of Roger Gimbel to quash the subpoena served by the Federal Deposit Insurance Corporation ("FDIC") is denied and the cross-motion of the FDIC to enforce the subpoena is granted. The FDIC has made an adequate showing that it has a reasonable basis for its determination that Mr. Gimbel may be liable to the bank of which he was a director. In these circumstances, the FDIC may subpoena records relating both to his liability and his ability to pay any judgment that might ultimately be awarded. *In re McVane*, 44 F.3d 1127 (2nd Cir. 1995). The subpoena is by its terms limited to records in the custody and control of Mr. Gimbel and, therefore, does not compel the production of records of family members not themselves targets of the investigation.

SO ORDERED.

Dated: New York, New York
July 19, 1995

JOHN S. MARTIN, JR.
JOHN S. MARTIN, JR., U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed July 21, 1996
Docket No. 95-6187

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of February, one thousand nine hundred and ninety-six.

PRESENT: HON. Thomas J. Meskill
HON. J. Daniel Mahoney
HON. John M. Walker, Jr.
Circuit Judges

IN RE: SUBPOENA OF ROGER GIMBEL BY FDIC AS RECEIVER FOR FIRST NEW YORK BANK FOR BUSINESS.

ROGER GIMBEL,

Petitioner-Appellant,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent-Appellee.

MANDATE

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court

GEORGE LANGE III, Clerk

BY: ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

Issued as Mandate
April 25, 1996

Supreme Court, U.S.
FILED
JUL 22 1996
CLERK

No. 95-1888

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROGER GIMBEL, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment requires an articulable suspicion of individualized wrongdoing before a court can enforce a Federal Deposit Insurance Corporation subpoena seeking personal financial records from the former director of a failed bank.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

FDIC v. *Wentz*, 55 F.3d 905 (3d Cir. 1995)	5, 7
McVane, In re, 44 F.3d 1127 (2d Cir. 1995)	2, 3, 5, 7
Parks v. *FDIC*, No. 94-2262, 1995 WL 529629 (1st Cir. Sept. 13, 1995)	6
RTC v. *Walde*, 18 F.3d 943 (D.C. Cir. 1994)	3, 5, 7
Ryan v. *United States*, 379 U.S. 61 (1964)	3, 4, 5
SEC v. *Kaplan*, 397 F. Supp. 564 (E.D.N.Y. 1975)	3
Sandsend Fin. Consultants, Ltd. v. *FHLBB*, 878 F.2d 875 (5th Cir. 1989)	5
Sealed Case, In re, 42 F.3d 1412 (D.C. Cir. 1994)	7
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950)	3, 4, 7
United States v. *Powell*, 379 U.S. 48 (1964)	5
United States v. *Ryan*, 320 F.2d 500 (6th Cir. 1963), aff'd, 379 U.S. 61 (1964)	5
Vernonia School Dist. 47J v. *Acton*, 115 S. Ct. 2386 (1995)	6

Constitution and statutes:

U.S. Const. Amend. IV	3, 4
12 U.S.C. 1818(n)	2, 6
12 U.S.C. 1821(d)(2)(I)(i)	2, 6
12 U.S.C. 1821(d)(17)	7
12 U.S.C. 1821(k)	7

Statutes—Continued:

Page

12 U.S.C. 7602 (1958) 5
26 U.S.C. 7602(a) 5

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1888

ROGER GIMBEL, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 77 F.3d 593. The order of the district court (Pet. App. 24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1996. The petition for a writ of certiorari was filed on May 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver of the First New York Bank for Business (FNYBB) after it failed. Pet. App. 3a. In 1995, the FDIC issued an order of investi-

gation of FNYBB's former officers and directors. Pet. 4. The purposes of the investigation are to determine: (1) whether claims exist against FNYBB's former directors as a result of any actions or failures to act with respect to the institution; (2) whether pursuit of such claims would be cost effective; (3) whether the FDIC should seek to avoid any asset transfers made by those persons; and (4) whether the FDIC should seek to attach the assets of those persons. Pet. 3-4.

2. Acting pursuant to the order of investigation and its statutory authority to issue subpoenas, see 12 U.S.C. 1821(d)(2)(I)(i), 1818(n), the FDIC issued a subpoena *duces tecum* to petitioner, former FNYBB director Roger Gimbel, seeking records relating to his financial interests. Pet. 3-4. Petitioner moved to quash the subpoena, and the FDIC cross-moved for summary enforcement of the subpoena. *Ibid.* In support of its motion, the FDIC submitted the declaration of an FDIC investigator which stated that FNYBB had sustained significant losses resulting from insider loans and that the extent and nature of those losses suggested that the directors, including petitioner, were grossly negligent and had violated their fiduciary duty of loyalty to FNYBB by approving and/or ratifying the insider loans. Pet. App. 18a-19a.

3. The district court denied petitioner's motion to quash and granted the FDIC's cross-motion for summary enforcement. Pet. App. 24a. The district court found that the FDIC had "made an adequate showing that it has a reasonable basis for its determination that [petitioner] may be liable to the bank of which he was a director." *Ibid.* Relying on the Second Circuit's decision in *In re McVane*, 44 F.3d 1127 (1995),

the district court found that showing sufficient to support the FDIC's subpoena. Pet. App. 24a.

4. The court of appeals affirmed. Pet. App. 1a-23a. The court applied the standard set forth in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), for assessing the constitutionality under the Fourth Amendment of an administrative subpoena. Pet. App. 7a. That standard requires that the subpoenaed information be "reasonably relevant [to the agency investigation]," "not too indefinite," and "within the authority of the agency"; an agency need not establish probable cause in order to support the subpoena. *Ibid.* (quoting *Morton Salt*, 338 U.S. at 652).

The court of appeals rejected petitioner's contention that the *Morton Salt* standard applies only to corporate, and not to personal, records. Pet. App. 8a-16a. The court noted that, although corporations are not entitled to the same level of Fourth Amendment protection as are individuals, courts have applied the *Morton Salt* standard to subpoenas for personal financial records. *Id.* at 11a (citing *McVane*, 44 F.3d at 1137; *RTC* v. *Walde*, 18 F.3d 943, 946-948 (D.C. Cir. 1994); *SEC* v. *Kaplan*, 397 F. Supp. 564, 567, 570 (E.D.N.Y. 1975)). It further observed that this Court applied the *Morton Salt* standard to the enforcement of an IRS subpoena of a taxpayer's personal financial records in *Ryan* v. *United States*, 379 U.S. 61 (1964). The court of appeals reasoned that the rationale for affording corporations less Fourth Amendment protection than is accorded to individuals is that corporations, as creatures of the State, have limited grounds for a "reasonable expectation of privacy." Pet. App. 13a. The court of appeals found that bank directors, as participants in an intensely regulated industry, can claim no "expectation of privacy of a level

demanding a standard more demanding than the *Morton Salt* standard." *Id.* at 16a. The court accordingly concluded that, "[a]bsent circumstances not present in this case, the Fourth Amendment requires no showing beyond, the standard articulated in *Morton Salt* where the FDIC seeks the personal financial records of a director of a failed bank." *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 6-13) that the court of appeals erred in applying the standard set forth in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), to assess the constitutionality of an administrative subpoena of personal financial records. He argues (Pet. 9) that the FDIC must establish an articulable suspicion of individualized wrongdoing to support an administrative subpoena for personal financial records.

In *Morton Salt*, the Court upheld an administrative subpoena of corporate records issued by the Federal Trade Commission and held that such a subpoena is constitutional under the Fourth Amendment if the underlying investigation "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. at 652. A passage in *Morton Salt* states that "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Ibid.* As the court of appeals concluded, however, this Court's decision in *Ryan* v. *United States*, 379 U.S. 61 (1964), which applied the *Morton Salt* standard to an Internal Revenue Service (IRS) summons to produce personal financial records, establishes that the *Morton Salt* standard is not limited to corporate records. In

Ryan, the Court enforced an IRS summons of a taxpayer's personal financial records for the reasons stated in *United States* v. *Powell*, 379 U.S. 48 (1964). *Ryan*, 379 U.S. at 62. *Powell*, 379 U.S. at 57-58, in turn, applied the *Morton Salt* standard to an IRS summons of corporate financial records. Consistent with the Court's decision in *Ryan*, the lower courts have applied *Morton Salt*'s reasonable relevance test to administrative subpoena of personal financial records. Pet. App. 11a; *FDIC* v. *Wentz*, 55 F.3d 905, 908 (3d Cir. 1995); *In re McVane*, 44 F.3d 1127, 1137 (2d Cir. 1995); *RTC* v. *Walde*, 18 F.3d 943, 946-948 (D.C. Cir. 1994); *Sandsend Fin. Consultants, Ltd.* v. *FHLBB*, 878 F.2d 875, 878 (5th Cir. 1989).

Petitioner attempts (Pet. 10-12) to distinguish the IRS's summons authority from the FDIC's subpoena power. He argues that the IRS has a greater need for personal records than the FDIC, and that individual taxpayers have a lower expectation of privacy in their personal financial records than the former directors of failed federally insured financial institutions. Neither argument is persuasive. Congress placed no greater restrictions on the FDIC's subpoena power than on the IRS's summons authority,* indicating

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* The Secretary of the Treasury is authorized "[f]or the purpose of ascertaining the correctness of any return" to require the "produc[tion of] such books, papers, records, or other data * * * as may be relevant or material to such inquiry." 26 U.S.C. 7602(a). The Secretary was so empowered at the time that *Ryan* was decided. See *United States* v. *Ryan*, 320 F.2d 500, 501-502 (6th Cir. 1963) (quoting 1958 version of Section 7602), aff'd, 379 U.S. 61 (1964). The FDIC in its capacity as receiver is empowered, "for purposes of carrying out any power, authority, or duty with respect to an insured depository institution," to "exercise any power established

that Congress believed that the agencies have similar needs to obtain information within their respective areas of responsibility. The court of appeals also correctly concluded that bank directors, as participants in a highly regulated industry, have no greater expectation of privacy in their personal financial records than taxpayers. Pet. App. 15a (citing *Vernonia School Dist. 47J* v. *Acton*, 115 S. Ct. 2386, 2393 (1995) ("adults who choose to participate in a 'closely regulated industry' * * * have reason to expect intrusions upon normal rights and privileges, including privacy")).

2. Petitioner also contends (Pet. 13-18) that the Court should grant certiorari to resolve "confusion" in the lower courts regarding the constitutional standard applicable to the enforcement of FDIC subpoenas for personal financial records. There is no conflict among the circuits on that issue. In *Parks* v. *FDIC*, No. 94-2262, 1995 WL 529629 (Sept. 13, 1995), a divided panel of the First Circuit held that the *Morton Salt* standard does not apply to an administrative subpoena for personal financial records, and that such a subpoena must be supported by "individualized suspicion of wrongdoing by the target of the subpoena." *Id.* at *7. That decision, however, was withdrawn and rehearing en banc was granted. Pet. 16. On rehearing, the case was dismissed on motion of the parties "on the grounds of changed circumstances." Pet. 16 n.7. The courts of appeals that have addressed the issue are in agreement that the *Morton Salt* standard applies to administrative subpoenas of personal finan-

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under section 1818(n) of this title." 12 U.S.C. 1821(d)(2)(I)(i). Section 1818(n) grants the power to issue subpoenas. 12 U.S.C. 1818(n).

cial records. See *FDIC* v. *Wentz*, 55 F.3d 905 (3d Cir. 1995); *In re McVane*, 44 F.3d 1127 (2d Cir. 1995); *RTC* v. *Walde*, 18 F.3d 943 (D.C. Cir. 1994); *In re Sealed Case*, 42 F.3d 1412 (D.C. Cir. 1994). In applying the *Morton Salt* standard, the circuits have agreed that the FDIC and similarly empowered agencies have statutory authority to subpoena personal financial information for the purposes of determining liability and identifying avoidable asset transfers and attachable assets without establishing an articulable suspicion of wrongdoing. See *Walde*, 18 F.3d at 947-948; *McVane*, 44 F.3d at 1136; *Wentz*, 55 F.3d at 909; see also 12 U.S.C. 1821(d)(17), 1821(k) (FDIC in its capacity as receiver has power to avoid fraudulent asset transfers and to assert claims against an insured institution's directors and officers). No court of appeals has held otherwise.

Even if there were a question as to whether the FDIC must establish an articulable suspicion of individual wrongdoing to support an administrative subpoena of personal financial records, that question is not presented in this case, because the court of appeals found that the FDIC made such a showing. In *McVane*, the Second Circuit concluded that the FDIC lacks statutory authority to subpoena personal financial records solely for the purposes of determining whether litigation would be cost-effective, unless the agency "articulate[s] specific grounds for its suspicion of liability." 44 F.3d at 1139-1140; see also *Walde*, 18 F.3d at 947-948; cf. *Wentz*, 55 F.3d at 909 (reserving the question). The FDIC in this case identified determining cost-effectiveness as one of the purposes of its subpoena. Pet. App. 18a. The court of appeals considered whether the FDIC had "articu-

late[d] specific grounds for its suspicion of liability," and concluded that it had. *Id.* at 22a-23a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1996